No. 14747

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

COMMERCIAL TRAVELERS INSURANCE COMPANY,
a corporation, *Appellant,*

vs.

NOVA GARETT WALSH, individually and as
administratrix of the estate of
Ralph H. Garrett, deceased, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Washington
Northern Division

OPENING BRIEF OF APPELLANT

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JURISDICTION

Jurisdiction arises out of diversity of citizenship (28 U. S. Code 1332). Appellant is a corporation organized under the laws of the State of Utah and Appellee is a resident and citizen of the State of Washington. The amount in controversy exceeds $3,000.00, exclusive of interest and costs (Findings of Fact I, II and XII, R. 13, 19).

The action originally was filed in the Superior Court of the State of Washington in and for the County of Stevens and was thereafter removed by Petition, Notice and Removal Bond to the United States District Court for the Eastern District of Washington, Northern Division (R. 26) (28 U. S. Code 1441(a).

This appeal is taken from the final decision of the District Court under the provisions of 28 U. S. Code 1291, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The single question involved in this case is whether Appellee, representing the beneficiaries on an accident policy written by Appellant is entitled to recover on said policy by virtue of the death of said Ralph H. Garett occurring under the circumstances disclosed by the testimony in the case and summarized in the Findings of Fact of the trial court.

The policy in question (Plaintiff's Exhibit No. 1, R. 34-36) carries the heading in part: "Benefits for Loss of Life . . . by Accidental Means . . .," and the insuring clause specifically insured Ralph H. Garett for $3,750.00 against loss of life "resulting directly and exclusively of all other causes, from bodily injuries sustained during the life of this policy solely through external, violent and accidental means . . ." (Findings of Fact II, R. 14; Plaintiff's Exhibit No. 1, R. 34-35).

The facts leading up to Ralph H. Garett's death are very little in dispute and are summarized in the trial court's Findings of Facts, to which no exception has been taken on this appeal. In brief, they are as follows: Ralph H. Garett in September of 1953 was a heart cripple suffering from an advanced condition of arteriosclerosis of the coronary arteries. Autopsy disclosed that one of said arteries had been completely closed by a previous heart attack and two of the other

arteries had been narrowed to about one-third of their normal size (Findings of Fact X and XI, R. 18).

Mr. Garett had been advised by his family doctor to quit farming in 1951, and again in August of 1953 he had been advised to quit work and rest (Statement by Mrs. Garett, Defendant's Exhibit No. 2, R. 59-60).

On September 24, 1953, Mr. Garett, accompanied by his son, Ralph Garett, Jr., took his Chevrolet flat bed truck and drove from his farm to Colville, Washington, where he procured a load of seed wheat consisting of 43 separate sacks weighing approximately 140 pounds each. He drove back to his farm, backed the truck up to the front porch of a small cabin-type building, which was used for storage, and placed a 2'' x 8'' plank from the rear end of the truck across the front porch of the cabin to the cabin doorway. The cabin porch and floor were some three feet above the ground so that the plank actually was elevated only some eighteen inches to two feet above the surface of the porch floor. Mr. Garett and his son then proceeded to unload said wheat sacks by the following method: Mr. Garett would drag the sacks along the bed of the truck to the end of the plank, lift up one end, placing each sack upright at the end of the plank. The son, Ralph Garett, Jr., would then place his right arm around the sack and slide it along and down the plank in an upright position into the storage building. The son was fourteen and one-half (14½)

years of age, 5' 6'' tall and weighed 125 pounds (Findings of Fact IV, V and VI, R. 14-15).

After unloading about nine sacks of wheat in the foregoing manner, Mr. Garett proceeded with the tenth sack, dragged it to the end of the truck, stood it upright at the end of the plank, and his son, Ralph Garett, Jr., "took hold of said sack and had started to slide it down the plank described above, when said sack of wheat got out of control of the said Ralph Garett (Jr.) and started to fall over in an opposite direction from said plank. That Ralph H. Garett, now deceased, was standing a few feet from said sack of wheat last described, and, when he observed that his son was unable to hold said sack of wheat upright on said plank, the said Ralph H. Garett took one step forward, reached out and quickly or suddenly jerked or grabbed said sack of wheat with one hand, and with the other hand held onto the building into which the wheat was being loaded, and remained in this posture, holding the sack of wheat at about a 45 degree angle, until the said Ralph Garett went around said truck to the opposite side of said plank and assisted his father, the said Ralph H. Garett, in straightening up said sack of wheat" (Findings of Fact VII, R. 16).

After said sack of wheat was straightened up, the son moved the same into the building as with the previous sacks of wheat, and after returning found his father in a stooped position on the truck, holding his chest

and complaining of pain. The father was unable to continue the unloading process, and that night drove with his wife to Spokane, Washington, where he was immediately hospitalized by Dr. D. W. McKinlay and where, on September 25, 1953, he died. An autopsy showed the pre-existing heart condition above referred to, and also showed a fresh thrombus or blood clot plugging one of the arteries. It was the opinion of Dr. McKinlay that the new blood clot and resulting death were the result of the "additional exertion" involved in the incident with the tenth sack of wheat above described (Findings of Fact VII, VIII, IX, X and XI, R. 16-19).

The Certificate of Death signed by Dr. McKinlay showed under the medical certification, "I. Disease or Condition Directly Leading to Death (a) Coronary Occlusion; Antecedent Causes (b) Arteriosclerosis." The bracket in the Certificate of Death under Paragraph 21a. covering "Accident" is left blank (Plaintiff's Exhibit No. 3, R. 97).

One further fact found by the Court should have been referred to above: "That if said Ralph H. Garett had not reached out and held said sack of wheat, it would have merely fallen 18 inches to 2 feet to the porch floor of said building, from whence it could have been moved into the storage room" (Findings of Fact VII, R. 16).

From the foregoing Findings of Fact, the trial court drew the conclusions which Appellant challenges by this appeal, namely, the conclusion that the incident above described constituted an accident within the terms of the accident insurance policy entitling Plaintiff to recover the face amount thereof.

SPECIFICATION OF ERROR

1. The Court erred in concluding "that the falling of said sack of wheat from the plank, on which it was being unloaded by the said Ralph Garett, son of Ralph H. Garett, now deceased, followed by the taking hold of said falling sack of wheat by said Ralph H. Garett, in the manner above described, was an unusual, unexpected and unforeseen event, and the court finds that the same constituted an accident (Conclusions of Law I, R. 20).

2. The Court erred in concluding "that the acute or sudden coronary attack suffered and sustained by the said Ralph H. Garett, as hereinabove described, amounted to an accident as contemplated and defined by the express terms of the policy of insurance—and that the death of said Ralph H. Garett resulted directly and exclusively of all other causes, from bodily injury sustained solely through external, violent and accidental means . . ." (Conclusion of Law II, R. 20).

3. The Court erred in concluding that Appellee (Plaintiff) was entitled to judgment against Appellant (Defendant) for $3,750.00, and interest, under the terms of said accident insurance policy (Conclusion of Law III, R. 21).

4. The Court erred in entering judgment on the findings and conclusions in favor of Appellee and against Appellant (R. 22-23).

ARGUMENT

1. Decedent's death resulted from an intentional act, thereby barring recovery for accident under the Washington law.

The accident policy in this case insures against death "resulting directly and *exclusively* of all other causes, from bodily injury sustained during the life of this policy *solely* through external, violent and *accidental means* . . ." (Emphasis supplied).

We have underlined four of the words in the insuring clause above to point up the basis on which we believe recovery should be denied in this case. However, we shall refer to the last term "accidental means" first inasmuch as it appears to us that the authorities in the State of Washington are conclusive in holding that under this provision the death must not merely be unforeseen or unexpected but that the *means* by which death is caused must be accidental and that accident is never present when an intentional act is performed.

The leading case on this point is, we believe, *Evans v. Metropolitan Life Insurance Co.,* 26 Wash. (2d) 594; 174 Pac. (2d) 961. This was a six to two en banc decision in which the Washington Supreme Court rejected the line of cases holding that mere physical strain resulting unexpectedly in death is sufficient to establish a right of recovery on an accident policy. On

the contrary, the court held that where the physical strain or exertion was the result of an intentional or deliberate act that there was no "accidental means" on which recovery could be based. The facts in the Evans case disclose that Mr. Evans stalled his automobile on the way home from church and got out to push it in order to start the engine running again. He pushed it to the start of a steep grade and then started towards the door to get in when he collapsed. A post mortem revealed that the immediate cause of death was coronary thrombosis due to Arteriosclerosis. The doctor testified that heart strain produced by shoving the automobile caused the final thrombosis and that probably Mr. Evans would not have died at that time except for the over-exertion.

The court reviewed all of the prior cases as well as authorities from other jurisdictions and held there could be no recovery because the pushing of the automobile was a voluntary act and could not be classified as an accidental means. We quote from page 622 (Washington report) of the opinion:

> "In this case, the pushing of the automobile was the means by which the injury was caused, and there was nothing unforeseen, involuntary, or unexpected in the act in which the insured was engaged from the time he started his car by pushing his foot on the pavement until he collapsed. There was no stumbling, slipping, or falling in his movements. He engaged in pushing his automobile for his own convenience. He encountered no obstacle

in doing so. *He accomplished just what he intended to in the way he intended to, and in the free exercise of his choice.* No accident of any kind interefered with his movements, or for an instant relaxed his self-control. There was an unforeseen result of the insured's deliberate actions. The result of any action, however, cannot be considered in the determination of the question of whether there was an accident (Ephasis supplied).

"The conclusion we must reach from a consideration of all the cited cases is that accident is never present when a deliberate act is performed, unless some additional, unexpected, independent, and unforeseen happening occurs which produces or brings about the result of injury or death."

The above rule as adopted in the *Evans* case was reaffirmed by the Supreme Court in *Johnson v. Business Men's Assurance Co.,* 38 Wash. (2d) 245; 228 Pac. (2d) 760. The insuring clause in this case was identical with that involved in the case at bar. It appeared that Johnson collapsed and died from a heart attack shortly after emerging from his burning home from which he had been hurriedly and strenuously moving furniture and personal belongings. There was evidence that in the process Johnson had inhaled a considerable amount of smoke and had done some heavy coughing. The trial court submitted the case to a jury which rendered a verdict for the plaintiff. This verdict was set aside on a motion for judgment n.o.v. and the Supreme Court on appeal affirmed the entry of judgment n.o.v. for defendant.

The court said:

"The rule is now firmly established in this state that, in order to recover under a policy insuring against death or injury by accidental means, (1) it is not enough that the result was unusual, unexpected or unforeseen, but it must appear that the means were accidental; and (2) accident is never present when a deliberate act is performed, unless some *additional, unexpected, independent, and unforeseen happening occurs which produces or brings about the result of injury or death. Evans v. Metropolitan Life Ins. Co.,* 26 Wn. (2d) 594, 174 P. (2d) 961; *McMahan v. Mutual Benefit Health & Accident Assn.,* 33 Wn. (2d) 415, 206 P. (2d) 292" (Emphasis supplied).

* * * *

"It is therefore our opinion that the evidence provides no basis for a jury finding that death was caused by inhalation of smoke, or other deleterious effects of the fire, unrelated to Johnson's excitement and exhaustion due to his own activity and the whole tragic experience of witnessing the destruction of his home. It is to be remembered that the policy insured only against loss effected solely through accidental means 'resulting directly and independently of all other causes.'

"It is the settled rule that death due to dilation of the heart, coronary occlusion or thrombosis, or other circulatory failure resulting from mere overexertion, independent of a slip, fall, or other unforeseen occurrence, does not give rise to liability under an accident insurance policy of this kind."

Two earlier cases to substantially the same effect are *Hodges v. Mutual Benefit Association,* 15 Wash. (2d)

699; 131 Pac. (2d) 937; and *Crowell v. Sunset Casualty Co.,* 21 Wash. (2d) 238; 150 Pac. (2d) 728. Both of these cases involved sudden and unexpected deaths from heart attacks brought on by strenuous and unusual exertion, but in both cases the exertion was voluntary and intentional on the part of the deceased. In the *Hodges* case it was a matter of strenuous dancing. In the *Crowell* case it was a matter of unusually strenuous work by an employee engaged as a steam engineer in a lumber mill.

2. There was no unusual, unexpected or unforeseen happening constituting an accident in this case.

Appellee contended at the trial that the force and effect of the decisions set forth above was avoided in the present case by reason of an unforeseen, unusual and unexpected event—namely, the over-balancing of the tenth wheat sack. Defendant submits, first of all, that this particular occurrence or happening as outlined in the testimony and as set forth in the court's Findings of Fact does not constitute an unforeseen, unusual and unexpected happening rising to the dignity of the term accident.

"The burden rests upon the plaintiff to show that the death of the insured occurred through accidental means. To justify a recovery upon such a policy as that here in question, the evidence introduced in support of the claimant must be substantial" (*Crowell v.*

Sunset Casualty Co., 21 Wash. (2d) 244; 150 Pac. (2d) 728). How then can it be said that the over-balancing of a 140 pound wheat sack placed on end on a small plank only eight inches wide is an unusual, unexpected or unforeseen event? The whole process of unloading was, so to speak, standard practice. Clearly the standing of wheat sacks on end requires balancing them. Clearly the possibility of a sack losing its balance is foreseeable and to be expected. To us it would appear that this is a matter of common knowledge and judicial notice.

The sack was not falling on the father or on the boy, nor would the sack itself have been damaged if it had been allowed to overbalance all the way. On the contrary, it would have dropped a mere 18 inches to 2 feet to the cabin porch floor.

We respectfully submit at the threshold that there is no substantial evidence of any unusual, unexpected or unforeseen occurrence. The whole unloading operation was a normal process. In fact the complaint of plaintiff shows that from the inception of this suit there was no contention of anything unusual or unexpected.

Complaint paragraph IV (R. 4) recites that:

> "... while engaged in his usual occupation as a farmer, was unloading a load of wheat upon his farm."

and Paragraph V (R. 5):

> ". . . such coronary occlusion was caused by no other means than the sudden strain due to the lifting by said Ralph H. Garett of heavy sacks of wheat . . ."

and Paragraph VI (R. 5):

> "That the injury sustained by the said Ralph H. Garett while engaged in lifting heavy sacks of wheat at his farm . . ."

Note that the complaint of plaintiff refers to sacks in the plural and treats the occurrence as a single course of events. Obviously, if considered as a single unified course of events there is nothing unusual, unexpected or unforeseen. But whether considered as a unified course of events or whether the incident of the tenth sack be segregated out, still we repeat it does violence to common knowledge as well as to the normal intelligence and know how of Mr. Garett, who had been a farmer for many years, to assert that the possible over-balancing of an upright sack of wheat standing on a narrow eight-inch plank was unforeseen, unexpected or unusual.

3. The occurrence did not by itself involve Mr. Garett in any event.

If we may assume for the sake of argument that the loss of balance of the tenth wheat sack was an unusual,

unexpected and unforeseen event, nevertheless, we submit as a matter of law under the *Evans* and *Johnson* decisions, it was not the type of occurrence, and the occurrence did not operate in a way, to support recovery under this accident policy. We believe that the sum and substance of the law in this state under the *Evans* and *Johnson* decisions is that the unusual occurrence must be something which happens *to the insured* or operates upon him without regard to his own act or volition.

However, when the unforeseen occurrence does not happen to the insured or operate upon the insured by itself, but is merely a collateral event, something which simply happens and which in turn leads or induces the insured voluntarily to do something on his own part, then the cases hold that the unexpected happening has not produced the result of injury or death, and accordingly there can be no recovery on the accident policy. For example, in the *Evans* case the stalling of the automobile was certainly an unexpected, unusual and unforeseen event. Nevertheless, it did not by itself operate upon the insured in any physical, bodily, external or any other way until he voluntarily got out and pushed the car out of the intersection. This was his choice. That is, upon the occurrence of the event he had the choice of either leaving the car where it was or attempting to push it. He chose to push it. This was a deliberate act on his part and, accordingly, in the

Evans case it was held there could be no recovery. Or, for example, in the *Johnson* case, surely the burning of the decedent's home was an unexpected, unforeseen and unusual event. Johnson reacted to the event as would anybody. Namely, he attempted to take as much of his furniture and belongings out of the house as he could. Nevertheless, this was a voluntary act on his part. It was a choice which he made and the court again held there could be no recovery.

We submit that the same conclusion is unavoidably indicated in the present Garett case. The tipping over of the wheat sack after it had been turned over by the father into the boy's control was not something that in itself happened to the father or operated upon the father. He had the choice immediately either to let the sack fall to the porch floor or to reach out and attempt to hold it. He chose the latter course. It is immaterial that this may have involved quick action on his part because it was still a voluntary and intentional action. Thus in the *Evans* case, the court says:

> "He accomplished just what he intended to, in the way he intended to and in the free exercise of his choice. No accident of any kind interfered with his movements or for an instant relaxed his self control. There was an unforeseen result of the insured's deliberate actions. The result of any action, however, cannot be considered in the determination of the question of whether there was an accident."

If decedent had permitted the sack to fall it would only have dropped down 18 inches to 2 feet on to the porch floor without in any way damaging the sack of wheat or injuring the boy or anyone else. At most it would have been slightly less convenient for the boy to drag the wheat sack into the cabin from the level of the porch floor, rather than down the slanting plank. In other words, there was no practical necessity for decedent to reach out and grab the wheat sack. Obviously it was an entirely voluntary or deliberate choice on his part. We submit that the present situation is much stronger for the appellant than in the *Johnson* case where the practical necessity for Johnson to save his household belongings from the fire almost dictated his choice.

CONCLUSION

We respectfully submit under the evidence and the Findings of Fact made by the trial court that there was no unusual, unexpected or unforeseen event and there was no accident—at least none which itself occurred to or operated upon the deceased, Ralph H. Garett; that the coronary occlusion brought on by overexertion was the result of decedent's own intentional act; that the law of the State of Washington does not support recovery on an accident policy such as that in this case under such circumstances.

We appreciate that the courts have gone a long way (and that they should go a long way) in construing policies of insurance liberally in favor of the insured; nevertheless, an accident policy which is written and paid for as such should not be converted by the courts into a life insurance policy. We believe that to permit recovery in this case would in effect be to disregard the express terms of the accident policy and to rewrite it into a life insurance policy. It is submitted that judgment should be reversed and the action dismissed.

Respectfully submitted,

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